SEP 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 348

VICTOR RAINER,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Carl L. Shipley, Alex Akerman, Jr., and Samuel Resnicoff on behalf of Victor Rainer pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above captioned case on June 11, 1958, granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's Petition.

A. OPINION BELOW

The opinion of the court below is reported at page 1a of the Appendix hereto.

B. JURISDICTION

The judgment sought to be reviewed was entered on June 11, 1958. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U. S. C. 1255. Petitioner contends that this petition raises important questions of federal law which have not been, but should be, settled by the Supreme Court.

C. QUESTIONS PRESENTED

1. Is the purported removal of a preference eligible from the federal service valid where the veteran is not kept in an active duty status during the notice period?

2. Has a preference eligible received adequate written notice of his proposed removal from the federal service where the Agency accelerates the effective date of the proposed removal?

D. STATUTE AND REGULATION INVOLVED

Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 61 Stat. 723, 5 U. S. C. 863, provides in pertinent part as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written

notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends.

Section 22.204 of the Civil Service Regulations is pertinent to a decision in this case and provides as follows:

> Status of employee during notice period. Whether the employee is given thirty (30) full days' advance notice under section 22.201, or less than thirty (30) full days' notice under paragraph (b) of section 22.202, he shall be retained in an active duty status during such notice period. However, in any case of a proposed adverse action, the employee may be placed on annual leave without

his consent when the administrative office does not consider it advisable from an official standpoint to retain him in an active duty status during the period of advance notice. When an employee is not placed on annual leave and the circumstances are such that his retention in an active duty status may result in damage to Government property, or may be detrimental to the interest of the Government or injurious to the employee, his fellow workers or the general public, the employee may be temporarily assigned to duties in which these conditions would not exist or he may be placed on leave without pay with his consent: *Provided*, That in an emergency case requiring prompt suspension of an employee, the employing agency may suspend him for not more than thirty (30) days. The employee shall be given written notice of the proposed emergency suspension at least twenty-four (24) hours in advance. The reasons for not retaining an employee in an active duty status shall be made part of the record. Such reasons shall be reviewed by the Commission in the event that the employee subsequently appeals from the final decision reached by the administrative officer.

E. STATEMENT OF CASE AND ARGUMENT

Petitioner is a veterans preference eligible with civil service status, who brought suit in the Court below to recover pay from August 17, 1956 to September 23, 1957, on the basis of an alleged unlawful separation from the Military Sea Transportation Service (Atlantic), Department of the Navy, Brooklyn, New York.

On July 17, 1956, petitioner was served with a notice of proposed removal for failure to obey the order of a superior and upon the further ground that petitioner had been notified of a ten day suspension (later reduced to 5 days). The notice stated that the effective date of the proposed removal would be on

or about 31 August, 1956, but not sooner than 30 days from the receipt of the notice. The notice provided that during the notice period petitioner would be carried in a work status. He was not carried in an active duty status during the entire notice period but was suspended from July 30 to August 2, 1956. On August 13, petitioner was notified by the agency that he would be removed from his employment effective August 17, 1956. On that date he was removed.

1. By Failing to Keep Petitioner in An Active Duty Status During the Notice Period the Agency Failed to Comply With Section 14 of the Veterans Preference Act.

The Veterans Preference Act requires thirty days written advance notice before removal of a preference eligible. Civil Service Regulation 22.204, issued pursuant to the Veterans Preference Act, requires that the veteran, with exceptions not pertinent here, be kept in an active duty status during this period. The Second Civil Service Region in the appeal of petitioner noted the failure of the Agency to keep petitioner in an active duty status during this period. It attempted to excuse this procedural error on the ground that the suspension resulted from a prior infraction and was not related to the current charge. In arriving at this decision the Civil Service Commission completely overlooked the fact that this prior infraction was a part of the charges in the notice of proposed removal and that in the final notice of removal the Agency stated this prior infraction was taken into consideration in arriving at a decision in the matter.

Petitioner contends that under Section 14 he is entitled to remain on active duty during the entire thirty day notice period. In this contention, he is supported, at least in part, by two decisions of the Court of

Claims, *Armand* v. *United States*, 136 C. Cls. 339 and *Taylor* v. *United States*, 131 C. Cls. 387. In these cases the veteran was placed on annual leave without his consent during the notice period. The Court allowed recovery for the time on annual leave. In the Taylor case the Court said:

> "The Act says that 'no permanent or indefinite preference eligible * * * shall be discharged * * * and the person whose discharge * * * is sought shall have at least 30 days' advance written notice'. This means, we think that he shall have 30 days' notice in advance of his being separated from the payroll. The regulation of the Civil Service Commission quoted above would deprive the preference eligible of this right. It would permit his separation from the payroll eo instante. This is in conflict with the Act and is, therefore, invalid".

We believe that this statement is in keeping with the spirit of the Veterans Preference Act. We contend, however, that proper application of the reasoning would be to hold the attempted removal void.

2. By Accelerating the Effective Date the Agency Voided the Notice of Proposed Removal.

On August 13, 1957, twenty seven days after the date of the notice of proposed removal the Agency accelerated the effective date of removal from on or about August 31, 1956 to August 17, 1956. The Act requires at least thirty days notice. *Stringer* v. *U. S.*, 90 F. Supp. 375, 379, holds "Section 14 contemplates two separate notices—a notice of proposed adverse action and a notice of proposed decision." We believe that Congress intended that the veteran was entitled to a definite time to answer the charges and put his house in order. We do not believe that the Courts should

approve the Agency playing a cat and mouse game with the veteran of first telling him he would be removed on or about August 31 and on August 13 advising him that he was to leave on August 17. Such action, it is contended, voided the original notice.

CONCLUSION

WHEREFORE, the premises considered, petitioner prays that his petition for a writ of certiorari be granted.

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 447-57

VICTOR RAINER

v.

THE UNITED STATES

Order

This case comes before us on plaintiff's and defendant's motions for summary judgment, together with the respective responses. Upon consideration thereof, and on the basis of the whole record in this case, and in the light of the hearing given to plaintiff by the Civil Service Commission, and the rulings made by said Commission in which they considered fully plaintiff's claims that there was procedural defect, and that he did not receive proper notice, the court is of the opinion that plaintiff's position in this case cannot be sustained, and

IT IS THEREFORE ORDERED this eleventh day of June, 1958, that plaintiff's motion for summary judgment be and the same is denied, and that defendant's like motion be and the same is granted, and plaintiff's petition is dismissed.

BY THE COURT

S/ MARVIN JONES

Marvin Jones,
Chief Judge.

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No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1958

VICTOR RAINER, PETITIONER

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. 1a) is not officially reported.

JURISDICTION

The decision of the Court of Claims was entered on June 11, 1958, and the petition for a writ of certiorari was filed on September 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner's removal from federal service was accomplished in compliance with Section 14 of

the Veterans' Preference Act and the applicable Civil Service regulations.

STATUTE AND REGULATION INVOLVED

Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 61 Stat. 723, 5 U.S.C. 863, provides in pertinent part as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; * * *

Section 22.204 of the Civil Service Commission Regulations, 5 C.F.R. (1958 Supp.) 22.204, provides as follows:

> *Status of employee during notice period.* Whether the employee is given thirty (30) full days' advance notice under § 22.201, or less than

thirty (30) full days' notice under paragraph (b) or § 22.202, he shall be retained in an active duty status during such notice period. * * *

STATEMENT

Petitioner, a veteran's preference eligible, was employed as a chauffeur with the Military Sea Transportation Service (Atlantic), Department of the Navy, at Brooklyn, New York until his dismissal for cause on August 17, 1956, for failing to obey a direct order of his supervisor (R. 8-9). On July 17, 1956, petitioner received a letter from the agency advising him of his proposed removal on or about August 31, 1956, but not sooner than thirty days from receipt of the notice (R. 10). In addition to specifying the proposed ground for his removal, this letter noted that on June 11, 1956 petitioner had been notified that he was to receive a ten-day suspension (subsequently reduced to five days) for damage to Government property through carelessness occurring on April 4, 1956 (R. 10). The letter further advised petitioner of his right to respond to the charge of disobedience and of his right to a hearing, and stated that during the notice period he would be carried in a work status (R. 10). Petitioner replied to the charges, but did not request a hearing (R. 10-11). The charge was sustained, and petitioner was removed from the service on August 17, 1956.[1]

[1] The letter of dismissal stated in part (R. 11):

2. After careful consideration of the facts in your case, including the statements contained in your letters of 23 July and 3 August 1956, it has been determined that you deliberately refused to carry out a proper order

During the interim between the original notice and his removal, the petitioner remained on active duty status except for four days when he was suspended to complete the five day suspension for the prior infraction (R. 27).

On petitioner's administrative appeal, his case received careful investigation and full review by the Civil Service Commission's Second Regional Office in New York City, which affirmed the employing agency's determination (R. 12).[2] Petitioner's dis-

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from your immediate supervisor in that on 16 July 1956, at approximately 1515, you were directed by Mr. Dominick Facciola, Leading Man Chauffeur, to report to Mr. Norman Curnin, Administrative Officer. You informed Mr. Facciola that if Mr. Curnin had anything to say to you Mr. Curnin should put it in writing and that you were not going to report. The order was repeated and you were informed by Mr. Facciola that, if you failed to report to Mr. Curnin, you were disobeying a direct order. You repeated your refusal.

[2] The decision of the Regional Office stated in part (R. 12-13):

After considering all of the evidence, summarized above, it is considered that the evidence and the appellant's admissions fully support the charge of insubordination. It is noted that in neither his letter of appeal nor in his affidavit to the Commission did the appellant deny the receipt of the orders alleged to have been given or his refusal to carry them out. The explanations offered by the appellant are neither corroborated nor do they justify his refusal to carry out the order of a supervisor issued in the performance of his duties. They are, moreover, speculative on the part of the appellant and are also qualified by the appellant's statement that he anticipated a call from Mr. Curnin with respect to his grievance appeal.

* * * *

It is the finding of this office that the Agency complied

missal was then reviewed by the Civil Service Commission's Board of Appeals and Review, and again affirmed.[3] Petitioner then filed suit in the Court of Claims, alleging that his removal from Government employment was arbitrary and capricious, and in violation of his rights under Section 14 of the Veterans' Preference Act, *supra*, p. 2. On cross motions for summary judgment, the court granted the Government's motion, denied that of petitioner and dismissed his petition below, holding that "on the basis of the

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with all of the procedural requirements of the law and the regulations in effecting the appellant's removal; that the Agency's action, based on the sustained charge, is considered to be for such cause as will promote the efficiency of the service; and that the Agency's action in separating the appellant is sustained.

[3] The Board's decision stated in part (R. 13-14):

The Board of Appeals and Review has given careful consideration to your representations and to all the evidence of record presented in connection with your initial appeal to the Second Regional Office. As a result of this study of your case, it has been concluded that the reason given for the adverse action shows just cause and has been substantiated by the weight of evidence and your own admission, and that the charge is of sufficient seriousness to warrant the action taken. Removal action in cases of insubordination is within the activity's schedule of penalties.

It has been established by the record that the personnel action of the activity in removing you from your position of Chauffeur, effective August 17, 1956, was not arbitrary, unreasonable, or capricious. There is no indication that your rights as a preference eligible employee have been violated. Accordingly, the decision of the Second Regional Office has been affirmed for the reasons set forth in the report of findings of that office, a copy of which was forwarded to you on September 21, 1956.

whole record in this case" petitioner's position could not be sustained (R. 45).

ARGUMENT

The extensive proceedings below have established that petitioner's removal from federal service was accomplished in full compliance with applicable statutes and regulations. The two contentions raised by petitioner in attempting to invalidate his dismissal were carefully considered and properly rejected by both the Civil Service Commission's Regional Office and its Board of Appeals and Review, as well as by the court below. They are clearly without substance and raise no issues for this Court's review.

1. Petitioner claims, first, that his rights were violated by the failure of the employing agency to retain him in an active duty status during the entire thirty-day period prior to his removal. Section 22.204 of the Civil Service Commission's regulations, *supra*, pp. 2-3, provides that an employee shall be retained in an active duty status during this notice period. Since petitioner was suspended during this period for four days—July 30 to August 2, 1956—he argues that the removal action should therefore be invalidated. This contention is meritless. As the Commission's Regional Office advised petitioner, and as the record makes clear (R. 27):

> . The four-day suspension occurring here and falling within the current notice period was imposed not as a result of the present allegation of insubordination, but as a penalty for a previous infraction, namely, carelessness, prior in

> time and unrelated to the charge in issue. Accordingly, the failure of the agency to keep the [petitioner] in an active duty status for the full notice period is not considered to be a procedural defect.

The petitioner is in error in asserting (Pet. 5) that the prior infraction was cited in the notice as one of the bases for removal. In fact the notice informed the petitioner of the proposed removal for disobedience and, in a separate paragraph, referred to the suspension as another infraction for which another penalty had been imposed (R. 10). Neither the statute nor the regulation relied on apply to this brief suspension.[4]

2. Equally groundless is petitioner's claim that the effective date of his removal was improperly advanced by the agency. As we have shown (*supra*, p. 3), the agency letter of July 17, 1956 informed petitioner that the effective date of his proposed removal "will be on or about 31 August 1956 but not sooner than 30 days from your receipt of this

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[4] It should be noted that even if, contrary to the Commission's findings, petitioner had been improperly suspended during this four-day period, such a defect would not invalidate the removal action, but merely entitle petitioner to recover his pay for those four days. This is the holding of the very cases upon which petitioner relies (Pet. 6), *Armand* v. *United States*, 136 C. Cls. 339, and *Taylor* v. *United States*, 131 C. Cls. 387, both involving situations where the employee was improperly placed on annual leave without his consent during the notice period. Since petitioner here was properly suspended upon the basis of an earlier and unrelated infraction, however, he is not entitled to recover back pay even for the limited period of his suspension.

notice." On July 23, 1956, petitioner answered these charges, and on August 3, 1956, he wrote a second letter to the agency in which he requested an "immediate decision" on the charges. He was thereupon advised, on August 13, 1956, that he would be removed effective August 17, 1956.

Obviously, this procedure fully complied with the statute. Petitioner was entitled to thirty days' notice, and he received such notice; the statute required nothing more. The reference in the letter of proposed removal to a date of "on or about 31 August 1956" certainly did not give petitioner any right to be retained until that date. To the contrary, the letter expressly advised petitioner that he might be dismissed after "30 days from your receipt of this notice." Nor can petitioner claim that he was injured or misled by the reference to the August 31, 1956 date; for he had not only completed his answer to the charges well before the expiration of the thirty-day period, but had in fact demanded immediate action in his case. He obviously has no basis for now claiming that he needed or anticipated additional time beyond the statutory period to prepare his defense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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